L.E.I. 82-1

(June 18, 1982)

CONTINGENT FEE FOR COLLECTION OF CHILD SUPPORT ARREARAGES

The Committee has been asked for its opinion upon the following issue: May a lawyer ethically charge and collect a contingent fee for collecting child support arrearages for use by the child or custodial parent when the custodial parent cannot pay a fee?

Reasonable contingent fees are acceptable in civil matters, depending upon the nature of the case.

EC 2-20 provides, in part, as follows:

> Because of the human relationship involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

Because the term "domestic relations cases" embraces many types of cases, it must first be determined if the limitation imposed on contingent fees in domestic relations cases extends to civil actions for the collection of past due child support payments.

Public policy prohibits any contract which tends toward the separation of husband and wife or circumvents attempts at reconciliation. Allowing attorney fees based upon a percentage of an expected alimony award would tempt an attorney to expedite a divorce and collect the fee despite the chance that reconciliation of the parties might be possible. The same rationale would apply

to the charging of contingent fees calculated on the size of lump sum or monthly support awards for children involved in divorce proceedings. Therefore, the charging of a contingent fee in divorce and separation proceedings is generally held to contravene public policy. "A fee contract contingent on procuring a divorce, or contingent in amount on the amount of alimony, support, or property settlement to be obtained, is against public policy and void." 7 Am. Jur. 2d Attorneys at Law § 257 (1980). It constitutes unprofessional conduct for an attorney to enter into a contingent fee contract in a divorce case. 7 C.J.S. Attorney & Client § 56 (1980); In re Smith, 42 Wash. 2d 188, 254 P.2d 464; Morfeld v. Andrews, 579 P.2d 426 (Wyo.).

However, not every contingent fee arrangement in a domestic relations case violates public policy and is void per se. The validity of a contingent fee contract will depend upon the factual background and the circumstances of the particular case. Thus, a contingent fee contract with a wife to recover her separate property does not violate public policy and is enforceable. Salter v. St. Jean, 170 So. 2d 94 (Fla.); Smith v. Armstrong & Murphy, 181 Okla. 293, 73 P.2d 140; 7A C.J.S. Attorney & Client § 315 (1980). A lawyer may accept a percentage for collecting overdue alimony but not a percentage of that to accrue subsequently. H. Drinker, Legal Ethics (1953), p. 176.

Dissolution of the family has already occurred; the disregard of the defaulting parent for the welfare of the child is evidenced by nonsupport.

Often, the custodial parent, subsequent to a divorce, is financially unable to retain counsel for personal funds; the responsible parent's failure to pay both alimony and child support denies the custodial parent the means by which to pay counsel to protect the interest of the child. State v. Cosby, 285 P.2d 210 (Okla. 1955); Costigan v. Stewart, 91 P. 83, 84 (Kan. 1907). Moreover, support for a child may become a charge upon the public purse. Davis v. Prunty, 114 W. Va. 295, 171 S.E. 644 (1933). Public policy favors avoiding state support of children when parents or custodians are able to do so.

At a time when legal aid services are being curtailed and individual efforts encouraged, it would serve no useful purpose to deny what may be the only option available to a custodial parent to obtain counsel to collect past due child support. The Committee here assumes that the custodial parent has, as a matter of law, the capacity to contract in such situations, and that the custodian can bind the estate of an infant, so as to create a lien upon the fund produced by the lawyer's efforts. In Baker v. Baker, 538 P.2d 1277 (Or. App. 1975), it was held that in civil contempt proceedings to collect support arrearages, infants are not parties to the action. The judgment ordering support is not a part of the child's estate and the parent or guardian is not the trustee of the funds for the child, but has the option to institute the suit and control it after it is instituted and also receives the proceeds of the judgment with the sole right to its disposition. See Costigan v. Stewart, supra. It would thus appear that a parent or

guardian may contract with privately-retained counsel for collection of child support payments on a contingent fee basis.

Other states' ethics opinions have permitted contingent fee arrangements in child support collection cases. L.A. Co. 78 (Inf. Op. 1969-1); Ill St. B. Assn. Opin. 337 (Feb. 12, 1971); Ore. S.B. Supp, 1960, p. 21 (Opinion 56, December 14, 1957); and Wash. S.B. 76 (Opinion 75, March 1960). The Committee sees no legal or ethical reason to deviate from this general trend, concluding that limitations imposed on contingent fee arrangements in domestic relations cases should not be extended to include child support arrearages cases where the custodial parent cannot otherwise pay the lawyer and that no ethical impediments should prevent such practice. It should be noted that full-time and part-time prosecuting attorneys or their assistants have a preexisting statutory duty to pursue collection of delinquent child support payments and any fee charged to a parent by them to pursue U.R.E.S.A. and similar statutory support collection actions would be inappropriate. See W. Va. Code §§ 48-9-1, et seq. (1980).